SUPREME COURT, U. S.

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In the Supreme Court of the United States

OCTOBER TERM 1968

No. [redacted]162

ROBERT N. GOLUBIN,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS TENTH CIRCUIT

Robert N. Golubin, petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on April 22, 1968.

Citations To Opinions Below

The opinion of the United States Court of Appeals for the Tenth Circuit is reproduced in Appendix A. The opinion has not, as yet, been published in the Federal Reports.

The decision of the United States Court of Appeals for the Tenth Circuit is as yet unpublished, and is set forth in Appendix A. On May 18, 1968, Mr. Justice White entered an order extending the time for filing a petition for a Writ of Certiorari in the above entitled cause to and including June 6, 1968.

Statement Of Facts

For the purpose of this petition the Statement of Facts set forth in the opinion of the Court below (Appendix A) is adopted.

Reasons For Granting The Writ

Petitioner asks that this Court grant certiorari in this case to review the single question posed because it is one of broad and general application to the criminal jurisprudence of our federal courts. We ask the Court to reconsider so much of the decision in *Holland* v. *United States,* 348 U.S. 121, 139, 75 S.Ct. 127, as held that a jury charged with deciding a case based on circumstantial evidence need not be instructed that in order to convict, the circumstances proved must be such as to *exclude every reasonable hypothesis other than guilt:*

> "The petitioners assail the refusal of the trial judge to instruct that where the Government's evidence is circumstantial it must be such as to exclude every reasonable hypothesis other than that of guilt. There is some support for this type of instruction in the lower court decisions [cases cited], but the better rule is that where the jury is properly instructed on the standard for reasonable doubt, such an additional in-

struction on circumstantial evidence is confusing and incorrect. [Cases cited]

"Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more."

It is with these assertions of the essentially identical nature of circumstantial (inferential) and testimonial (direct) evidence with which we take issue; we hope to demonstrate, at least to a degree which will incline the Court to feel that full argument and decision is warranted, that there are special and important fundamental differences in the two.

I. The Importance of the Question Presented:

During the past decade, the Court has taken strong and progressive steps to improve the level and the quality of the administration of criminal justice in the United States. In addition to broadening the protections of the Bill of Rights, the Court has provided for considerable post-trial scrutiny of all judicial trial and appellate acts in criminal cases, in order that no constitutionally defective conviction be allowed to stand. *Fay* v. *Noia*, 372 U.S. 391, *Townsend* v. *Sain*, 372 U.S. 293, and *Sanders* v. *United States*, 373 U.S. 1.

But if modern trial records are painstakingly searched

for the vindication of *rights*, they are not equally searched for the establishment of *accuracy*. We think it may fairly be said that the ultimate aim of American Criminal Jurisprudence is to convict only those among the accused who:

(a) Are *in fact guilty* of the crime charged; and,
(b) Whose guilt can be demonstrated during a fair trial in open court with admissible evidence to such a degree of *certainty* that no reasonable doubt remains.

It is this class of persons, and this class *only*, which under our law is supposed to suffer punishment for criminal wrongs against society.

But we respectfully suggest that although the latter criterion is satisfied by definition every time that a conviction is affirmed on appellate review, we simply have no inherently reliable machinery to satisfy the former. Indeed, there is nothing in the United States Constitution or any rule of law that guarantees a citizen that he will avoid punishment if he obeys the law; that he will never be incarcerated if he remains innocent of wrongdoing. Although the average layman would shake his head incredulously if he were informed that a condition of innocence would not assure him his freedom, such is in fact the case. Careful examination of the system reveals that criterion (a) does not exist at all. We do not punish those who are guilty or innocent, but only those who are *convicted* after fair trials.

Fair trials are all that we can guarantee. The question of accuracy is entrusted entirely to the jury, and we simply hope that they make no mistakes. It is they (or, as in this case, judges sitting as finders of fact) who are charged with the final duty—declaring the conviction or acquittal of a citizen—and our law has no machinery to correct their

errors, if any are made. In essence, *we require that juries be infallible.*

But certainly this is a degree of perfection which we cannot require. Knowing as we do that jurors are no more and no less than human beings who have, to some extent (depending on the jurisdiction) been screened, they are not infallible. They will and do make mistakes, and those of us charged with the fair administration of justice know it. Our task, therefore, is to install within the system safeguards which are sufficient to protect the innocent. That is to say, we have geared the machinery of jury trials in a manner calculated to resolve all mistakes against the government, which can far better afford a wrongful acquittal than any citizen can afford a wrongful conviction. The principal question raised in this petition is whether or not those safeguards are sufficient.

An individual accused of crime has, in essence, two protections. First, he enjoys a presumption of innocence coupled with a burden on the government to show evidence of his guilt (we carefully omit the use of the word "proof", which is a misnomer; "proof" under our law is no more than evidence which supervenes or overcomes the risk of non-persuasion). Second, he is not to be judged guilty unless the degree of certainty arising from the evidence is a high degree, eliminating all likelihood of innocence, and even a reasonable *chance* of innocence. Without becoming mired in that philosophical quicksand which avers that "It is better to free one hundred guilty men than to incarcerate one who is innocent," we can safely assert that the standard of "proof beyond a reasonable doubt" is a legal safeguard designed to protect those who have done no wrong, even though its use will free some guilty men.

The real meaning of the phrase "beyond a reasonable doubt", a term generic to the law, might well warrant an attack or dissertation; but not in this petition. Whether it

be viewed as a circuitous excursion in semantics or the pinnacle of revealed wisdom, "beyond a reasonable doubt" is our standard of criminal judgment. Whether that standard safeguards innocence—which is the duty of the law, unquestionably—as well in inferentially demonstrated cases as in directly demonstrated cases is discussed below.

II. Direct Cases: "Beyond A Reasonable Doubt"

In essence, American juries have two considerable functions. First, they must evaluate and decide credibility. In virtually every jurisdiction, a jury may believe, as it sees fit, all or part or none of what a witness says. Second, it is empowered to draw inferences. From evidence which it accepts as fact it may infer further facts which may show guilt.

The exercise of these two intellectual functions, together with the adjustments involved in reaching the ultimate judgment or verdict) is just about all that a jury does or is allowed to do. The question, therefore, is whether these two functions are really part and parcel of the same amalgam, or whether they are so intrinsically separate and distinct as to warrant the use of different rules and guides.

Judgments as to credibility require the application of several elements of human perception. In determining the extent to which a witness' articulation of an event may be truly representative of that event as it occurred, jurors must guard against two phenomena which may flaw the articulated imagery: Mistake, and lack of candor. If a witness did not correctly perceive the event in issue, or if having perceived it he has misremembered what occurred, his testimony will necessarily be misleading. Or, assuming that he has survived the pitfalls of memory and perception without diminution of his accuracy, unless he hews to the uncolored facts the efficacy of those preliminary functions

will be lost to the jury no matter how assiduously it seeks the truth.

To the function of evaluation of credibility, the standard of "beyond a reasonable doubt" may be relevant. Before discharging their duty to evaluate credibility, jurors are given the opportunity to observe the demeanor of the witness, and the manner in which he comports himself generally; his presence in answering direct questions as they are put to him by his proponent; his responses to cross-questions as his capacity for candor and accuracy are tested in the crucible of cross-examination, which is a bulwark of liberty *only against direct evidence;* and, in some cases, something of the witness' background, including his general reputation in the community.

When the testimonial event is complete, both counsel in summation will point out every consistency and inconsistency in the testimony, and all that is reasonable and probable or unreasonable and improbable about it. Then the jury will decide whether or not they can believe—as both truthful and accurate—the testimony they have heard as correct beyond doubt.

In the evaluation of credibility, the guide "beyond a reasonable doubt" may be both useful and meaningful, since it adequately conveys to the judges of the facts a caution to scrutinize testimonial evidence for any flaw, whether it result from bias, prejudice, non-perception, twisted memory, or a wilful desire to pervert the known truth. With these criteria, tested by *both* cross-examination and argument, a jury is assumed to believe only those who have reported the truth.

III. Circumstantial Cases: "The Exclusion of Every Reasonable Hypothesis of Innocence"

Although the layman is often wary of what *he* views as "circumstantial evidence", members of the legal profession

know that such evidence may be, when properly demonstrated, the most reliable and definite available to the course of human affairs. There are times when established facts fairly compel certain inferences to the exclusion of all others, and furnish a sound basis for saying that the inferred conclusions are fairly compelled by the circumstances. But because the event to be judged rests solely on inference, rather than on the recollection of a human being, great caution must be exercised to ensure that that event is *reliably established,* and not just one of several fair interpretations.

The assassination of Lee Harvey Oswald presents a useful example. Thanks to the diligence of the news media, millions of Americans saw Jack Ruby approach the victim; he was seen to present his pistol in the direction of Oswald. One with great perception (or a vivid imagination) may have seen the pistol jerk in recoil, or the slightest veil of smoke puff out from its muzzle. Almost immediately, Oswald was seen to double and grimace; he was later taken to the hospital where it was established that he had suffered a bullet wound in his midsection.

Millions thought, no doubt, that they were witnesses of the most direct kind to the shooting of Oswald, based on their having perceived the sequence of events described above. The fact is, however, that no human being ever saw a projectile leave the barrel of Ruby's pistol, or enter the body of Oswald. This was a fact to be inferred. The case, then, was circumstantial in only one narrow aspect—but it was circumstantial nonetheless.

Assume *arguendo* that Ruby claimed that he had fired a blank, and that Oswald had actually been shot by a remote assassin, operating a telescopically equipped rifle from some position behind him. Circumstances would have inveighed against him. The cartridges remaining in his pistol were all live, and the spent shell was of a manufacture which

could not have been blank in its origin; it could only have been blank if the original projectile had been fired, and the shell reloaded by hand. In addition, the lead removed from Oswald's body was consistent with a .38 caliber revolver, such as Ruby used. This pattern as set would compel an inference condemning Ruby. If the projectile extracted from Oswald is matched as to lands and grooves with a test bullet fired from the pistol taken from Ruby, the conclusion that he and no other shot Oswald becomes logically inescapable.

But supposing the death bullet had been proven to be caliber 30:06. No matter what the other circumstances, viewed singly or in the aggregate, this fact alone would block any inference that Ruby, with his .38 caliber pistol, had fired the fatal shot. His claim that the actual assassin must have been a rifleman would have sufficient corroboration to prevent circumstantial "proof" of his guilt.

As pointed out above, in circumstantial cases cross-examination is all but useless. Here the bare facts are not in dispute, but only the inferences to be drawn from them, counsel is left with no weapon but argument. Unless the special protections of the rule we advocate are used, the chances of conviction are too great when a theory of inferred guilt is only plausible, even though other theories could be supported by the established facts.

Since there is no direct linkage between the defendant and the alleged crime in the form of an eye-witness, a jury mistake in a circumstantial case becomes all but totally irreparable. That is to say, that whereas a witness who lies or is mistaken may be corrected during some post-conviction proceeding, where guilt is inferred, the images of criminal conduct conceived by the jury are mythical and unreachable. The inferred acts although they never took place, are stamped into the judgment in indelible ink.

IV. The Rule In Other Jurisdictions

We list below the status of the rule we advocate in American jurisdictions generally, both state and federal. Since experience with it seems to have commended its continued use, we suggest that these figures may be relevant to this Court in determining whether or not the "exclusion of innocence" rule should be used in federal criminal jurisprudence.

The petitioner's research reveals that there is a split of authority in the federal jurisdictions on the rule that where the evidence is wholly circumstantial the proof must exclude every reasonable hypothesis except the accused's guilt. Those following the rule are listed below in paragraph A, while those not following the rule are listed below in paragraph B.

A

District of Columbia:

Carter v. *United States,* 252 F.2d 608;

Fifth Circuit:

Cohen v. *United States,* 363 F.2d 321;
Hopkins v. *United States,* 337 F.2d 380;

Seventh Circuit:

United States v. *McCarthy,* 196 F.2d 616;

Eighth Circuit:

Byrth v. *United States,* 327 F.2d 917, 919;

> "Ordinarily, to obtain a criminal conviction, the government bears the burden of proving only that

the defendant is guilty beyond a reasonable doubt. However, this Court has recognized the well entrenched principle that in a criminal prosecution where the evidence is wholly circumstantial, the proof must exclude every reasonable hypothesis except the accused's guilt, for a conviction to stand."

NINTH CIRCUIT:

Urguidi v. *United States,* 371 F.2d 654.

B

FIRST CIRCUIT:

Dirring v. *United States,* F.2d, 512;

SECOND CIRCUIT:

United States v. *Aadal,* 368 F.2d 962, cert. denied 386 U.S. 970;

THIRD CIRCUIT:

United States v. *Allard,* 240 F2d 841;

FOURTH CIRCUIT:

United States v. *Luxenberg,* 374 F2d 241;

SIXTH CIRCUIT:

United States v. *Burkeen,* 350 F2d 261;

TENTH CIRCUIT:

The instant case (*U. S.* v. *Golubin*) -F2d-

The following state jurisdictions follow the rule.

Alaska: *Martinez* v. *State*, 423 P.2d 700
Alabama: *Sumeral* v. *State*, 106 So. 2 270
Arkansas: *Taylor* v. *State*, 204 S.W. 2d 379
California: *People* v. *Turner*, App., 57 Cal. Rptr. 854
Colorado: *Corbett* v. *People*, 153 Colo. 457, 387, P.2d 409
Connecticut: *State* v. *Bell*, 186 A.2d 805
Delaware: *Smith* v. *State*, 229 A.2d 21
Florida: *Day* v. *State*, 154 So. 2d 340
Georgia: *Taylor* v. *State*, 111 Ga. App. 690, 143 SF 2d 24
Idaho: *State* v. *Carlson*, 53 Idaho 139, 22 P.2d 143
Illinois: *People* v. *Widmayer*, 402 Ill. 143, 83 N.E. 2d 285
Indiana: *Baker* v. *State*, 236 Ind. 55, 138 N.E. 2d 641
Iowa: *State* v. *Boyle*, 230 Iowa 305, 297 N.W. 312
Kansas: *State* v. *Hendrix*, 188 Kan. 558, 363 P.2d 522
Kentucky: *Dority* v. *Commonwealth*, 269 Ky. 201, 106 S.W. 2d 645
Louisiana: *State* v. *Brent*, 184 So.2d 14, 248 La. 1072 cert. denied 385 U.S. 992
Massachusetts: *Commonwealth* v. *Fancy*, 349 Mass. 196, 207 N.E.2d 276
Maine: *State* v. *Allen*, 151 Me. 486, 121 A2d 342
Minnesota: *State* v. *Bell*, 262 Minn. 545, 115 N.W. 2d 468
Mississippi: *Blakeney* v. *State*, 225 Miss. 130, 82 So.2d 714
Missouri: *State* v. *Taylor*, 324 S.W. 2d 643
Montana: *State* v. *Stoddard*, 147 Mont. 402, 412 P.2d 827
Nebraska: *State* v. *Faircloth*, 181 Neb. 333 148 N.W. 2d 187
Nevada: *White* v. *State*, 52 Nev. 235, 255 P. 503
New Jersey: *State* v. *Brelna*, 134 A2d 738, 740, 46 N.J. Super. 313 affirmed 141 A.2d 529, 27 N.J. 97
New Mexico: *State* v. *Hinojos*, App. 427 P.2d 683, 78 N.M. 32
New York: *People* v. *Scito*, 242 NYS 2d 980, affirmed 250 NYS 2d 558, cert. denied 380 U.S. 941

North Carolina: *State* v. *Louther,* 265 N.C. 315, 144 S.E. 2d 64
Ohio: *State* v. *Greech,* 5 Ohio App. 2d 179 214 N.E. 2d 675
Oklahoma: *Fahay* v. *State,* Cr. 288 P.2d 757
Pennsylvania: *Comm.* v. *Mittleman,* 36 A2d 860, 154 Pa. Super 572
Rhode Island: *State* v. *Montella,* 88 R.I. 469, 149 A2d 919
South Dakota: *State* v. *McCreary,* 142 N.W. 2d 240
Texas: *Small* v. *State,* Cr. 365 S.W. 2d 18
Washington: *State* v. *Slaughter,* 425 P.2d 876
West Virginia: *State* v. *Maley,* 153 S.E. 2d 827
Wyoming: *Gardner* v. *State,* 27 Wyo. 316, 196 P. 750

Conclusion

For the reasons above set forth, petitioner respectfully prays that a Writ of Certiorari issue from this Court to review the judgment of the Court of Appeals for the Tenth Circuit.

Respectfully submitted,

F. Lee Bailey

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Boston, Massachusetts 02108

Appendix A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 9495 - MARCH TERM, 1968

ROBERT N. GOLUBIN,
APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

F. Lee Bailey for Appellant.
John Quinn, United States Attorney (*John A. Babington*, Assistant United States Attorney was with him on the brief) for Appellee.

Before MURRAH, *Chief Judge*, MARVIN JONES,* *Judge, Court of Claims*, and BREITENSTEIN, *Circuit Judge*.

BREITENSTEIN, *Circuit Judge*.

Appellant-defendant Golubin and two others, Walker and Allen, were charged in a 26-count indictment with the use of the mails to defraud in violation of 18 U.S.C. § 1341. The case was first tried to a jury which failed to agree and was discharged. The court thereafter entered a judgment of acquittal as to Allen. The government later dismissed the charges against Walker. Golubin waived a jury, and on trial to the court was convicted of 16 counts and sentenced to concurrent 3-year terms.

The charges stemmed from the sale of land in Taos

* Sitting by designation.

County, New Mexico. Great Southwestern Land Company acquired several sections of land at an average price of about $25 per acre. The land was located near the village of Tres Piedras, New Mexico, in a remote area. It was largely barren and arid, without the usual utilities, and of limited accessibility. The land was plotted into three subdivisions, Tres Piedras Estates, Carson Estates, and Ranchos de Taos Estates. The tracts were a quarter to a half acre in size.

The Land Company set up booths at various shows, fairs, and exhibitions. The public was induced to register for a purported drawing of free lots. The registrations were culled to eliminate the young, the old, and those who might be near neighbors. After the culling, letters were sent to all remaining registrants by certified mail notifying them that they had won a free lot and could obtain a deed by sending the amount of the closing costs. These were $49.30 for Tres Piedras Estates and Carson Estates, and $52.50 for Ranchos de Taos Estates. If the recipient responded by paying the requested amount, he was then visited by a salesman and urged to buy additional tracts. In all, about 26,000 lots were sold to about 10,000 purchasers. The use of the mails and the management and operation of the Land Company were stipulated. Defendant was president of the company.

Defendant has filed a transcript of the evidence received in the first trial and insists that his motion for acquittal in that trial should have been sustained because of insufficiency of the evidence. His argument of this point consists of a prolix and complicated narration of the evidence which is followed by a request that we sift the record and make an independent determination of its sufficiency. We respectfully decline to do so. Defendant fails to point out any significant difference between the evidence at the first trial and the evidence at the second trial. We have examined in

detail the record of the second trial and, as later noted, conclude that it sustains the conviction. The burden is on the defendant to show a substantial difference. He does not discharge that burden by bald assertions. Without a substantial difference, the conviction by the court in the second trial, which we uphold, establishes that in the first trial the evidence was sufficient to require submission to the jury.

Defendant says that the second trial subjected him to double jeopardy in violation of the Fifth Amendment but he cites no authorities to support his contention. The issue was not raised in, or considered by, the district court. We have expressly disapproved the practice of withholding an objection until after determination of guilt.[1] The first trial failed to dispose of the case because of the disagreement of the jury. In *Hunter* v. *Wade,* 10 Cir., 169 F.2d 973, 975, aff'd 336 U.S. 684, we held that where a jury fails to agree upon a verdict, the constitutional guaranty against double jeopardy does not bar a subsequent trial. This accords with the principles announced by the Supreme Court in *Gori* v. *United States,* 367 U.S. 364, 367-368, and in *United States* v. *Tateo,* 377 U.S. 463, 465-466. Retrial was proper because the first trial was a nullity—not an acquittal.

The attack on the sufficiency of the evidence is based on the generalization that the record shows no more than good faith participation in a legitimate business venture. This issue was for determination by the finder of the facts.[2] The controlling facts are not seriously disputed. The question is intent and it may be inferred "from the conduct of the defendants, and circumstantial evidence, upon which reasonable inferences may be based."[3] We have rejected the concept that when the evidence is circumstantial, it must

---

[1] See *Mares* v. *United States,* 10 Cir., 383 F.2d 805, 808; and *Ladakis* v. *United States,* 10 Cir., 283 F.2d 141, 143.

[2] *Wall* v. *United States,* 10 Cir., 384 F.2d 758, 761-762.

[3] *Id.* at 762.

exclude every reasonable hypothesis other than that of guilt.[4]

The defendant developed the methods which were used and supervised the operations thereunder. The registration booths were prepared so as to give the impression that a free lot would be awarded after the drawing. In some instances a drawing was held to determine who was entitled to a free poodle—but not who was entitled to a lot. The registrants who survived the culling to eliminate unlikely or undesirable prospects all received a letter sent by certified mail announcing their award. Enclosed was the registration on which was originally stamped "Winner—Judges Decision Final." After complaint by authorities of the State of Washington this was changed to read "Advertising Award." The letter said that acceptance of the offer must be made in 10 days and that a deed would issue upon receipt of the costs. Some letters stated that the costs included "surveying, staking, road building, deed preparation, etc." Others said that the cost total was "made up of $41.25 for a physical survey and staking to provide a legal description, $7.50 for deed preparation and handing and $0.55 to cover the cost of the necessary federal documentary stamps."

In practice no attention was paid to the 10-day limitation. A cost breakdown by the company accountant during a period of one year in which 11,293 lots were awarded showed a cost per lot of $3.721 for surveying. Other costs included:

Advertising	$ 1.098
Automotive and Travel	1.897
Commissions	19.182
Legal and Accounting	1.147

[4] *Id.*

Office Supplies, Postage and Printing	6.802
Rent	1.134
Road Construction and Maintenance	2.635
Salaries and Wages	6.041[5]

The district court reasonably concluded that the representation of costs was false, was known to be false, and was intended to deceive.

The district court found other misrepresentations in regard to the availability of water, electricity, and phone service. Of these, only water need be mentioned. The early literature of the company contained the statement: "It is our understanding that water can be obtained at approximately seventy-five feet." An expert testified that the estates were on a lava flow covered by a few feet of fill and that a dependable water supply could be obtained only by drilling 400-700 feet to the permanent water table. There is evidence that the defendant knew of the water situation and, at the insistence of his original co-defendant Walker, changed the statement on water to read: "Water is obtained by private well; however, there are concrete plans for a public water system to be completed in the foreseeable future." We are convinced that the trial court correctly concluded that the representations on water were not made in good faith but were designed to give a false impression that water was feasible at an economically practical cost by a private well.

On June 4, 1962, the Real Estate Commission of the State of California issued a cease and desist order against the Land Company. At the time it had about 30,000 leads ob-

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[5] The total cost per lot was shown to be $51.842. These costs were computed on the basis of the give-away lots and did not consider the lots purchased at higher prices. After receiving this cost study, the defendant fixed the price for the give-away lots on the Ranchos de Taos subdivision at $52.50 per lot.

tained from booth operations. To utilize the leads, defendant organized a new company, New Mexico Southwest Development Company, with dummy officers and through it disposed of 1500-1600 lots in the Ranchos de Taos Estates utilizing the methods developed for the Land Company.

The defendant's protestations of good faith, of the discharge of salesmen who made misrepresentations,[6] and of cooperation with the postal authorities must be weighed against the evidence of the actual operations in which defendant engaged. He dealt in deceitful statements of half truths and concealed material facts.[7] His actions were not those of a legitimate business man engaged in the permissible "puffing" of his product. The ultimate issue is that of intent and it was resolved against the defendant by the district court which found that he acted with intent to defraud and that the scheme was "reasonably calculated to deceive persons of ordinary prudence and comprehension."[8] The record, viewed as a whole, sustains the decision of the district court.

Affirmed.

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[6] These misrepresentations included statements as to paved roads and the existence of supermarkets on the properties.

[7] This is enough to establish a scheme within the prohibition of the mail fraud statute. *Williams* v. *United States*, 10 Cir., 368 F.2d 972, 975, cert denied 386 U.S. 997.

[8] *Gusow* v. *United States*, 10 Cir., 347 F.2d 755, 756, cert. denied 382 U.S. 906.

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OCTOBER TERM, 1968

ROBERT N. GOLUBIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1968

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Having waived trial by jury in the United States District Court for New Mexico, petitioner was convicted of mail fraud in the sale of lots and was sentenced to imprisonment for three years. Descriptions of the scheme and of the evidence supporting the conviction are set forth in the opinion of the court of appeals (Pet. App. A, 16–21). In upholding the sufficiency of the evidence, the court of appeals said (Pet. App. A, 18): "The controlling facts are not seriously disputed. The question is intent and it may be inferred 'from the conduct of the defendants, and circumstantial evidence, upon which reasonable inferences may be based.'"

311-978—68

Presumably on the basis of this language, petitioner asks this Court to decide whether, in a criminal prosecution, the circumstances proved must be such as to exclude every reasonable hypothesis except that of guilt. That question was settled in *Holland* v. *United States,* 348 U.S. 121, 139–140, a unanimous decision which petitioner now asks this Court to reconsider. There is no occasion here to re-examine *Holland,* however, because, as the court of appeals noted, the only real issue in the present case was the intent with which acts were done. Obviously, intent can rarely be proved either directly or conclusively, but must reasonably be inferred from the conduct of the defendant and the total circumstances of the case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1968.

U.S. GOVERNMENT PRINTING OFFICE: 1968